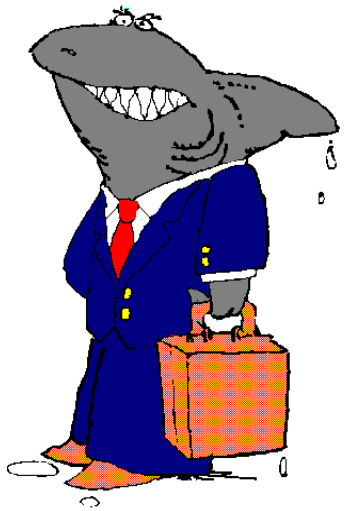
Asbestos Legal Issues



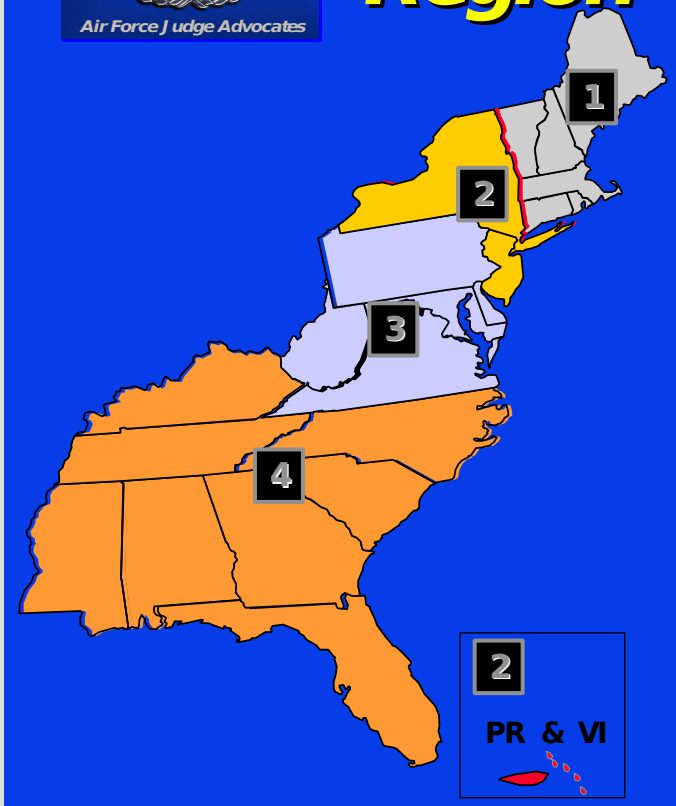
Lt Col Jim Cannizzo
AFLSA/JACE-ER
Mar 04

U.S. AIR FORCE

Eastern Region

JACE-ER/AFCEE CCR-A Region

Air Force Judge Advocates



Air Force Regional Environmental Coordinator (REC)
Federal Regions 1 - 4
DoD REC - Federal Region 2

States

21 States
DC, Puerto Rico,
& US Virgin Islands

Installations

38 - AF/AFRC
44 - ANG

U.S. AIR FORCE

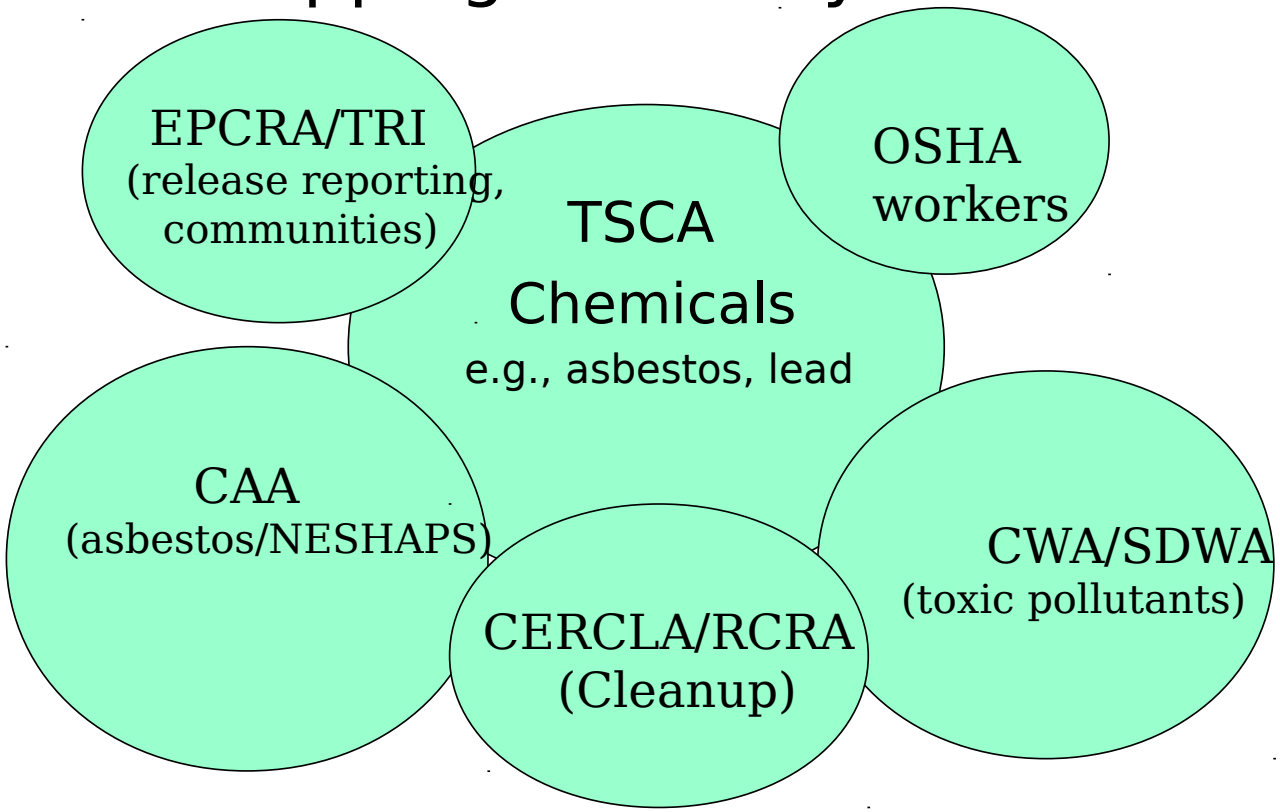
Overview

- Background: Asbestos
- Statutes
- Regulations
- Common Issues
- Civil Enforcement: Sovereign Immunity
- Criminal Enforcement
- Be proactive!
- Notice for Post-1980s Bldgs
- Self-Reporting

Background: Asbestos Statutory Scheme

- **<u>Toxic Substances Control Act</u> (TSCA): just applies in schools and for contractor accreditation**
- **<u>Other laws addressing media impacts</u>: Clean Air Act (CAA), Clean Water Act (CWA)**
- **<u>Worker Issues</u>: Occupational Health and Safety Act (OSHA)**
- **<u>Reporting and planning</u>: Emergency Planning and Community Right-to-Know Act (EPCRA)**
- **<u>Clean-up</u>: Resource Conservation and Recovery Act and CERCLA (Superfund Statute)**

Overlapping Statutory Scheme



U.S. AIR FORCE

Asbestos

- **Naturally occurring silicate mineral fiber**
- **Properties: incombustible, corrosion resistant, high tensile strength**
- **Microscopic - fibrous particles, float in air**
- **Ban on use began in 1979, most prevalent in buildings built pre-1980s (asbestos presumed to be present- PACM)**
- **“Asbestos containing material” (ACM) > 1% asbestos**

U.S. AIR FORCE

Health Risks from Asbestos Exposure

- Routes of entry are inhalation and ingestion
- Asbestosis, mesothelioma, lung cancer 10 – 40 years after exposure
- Exposure pathways include:
  - Fallout- old and deteriorated asbestos fibers become airborne
  - Contact- striking, cutting, drilling and the release of fibers
  - Reentrainment- sweeping, dusting or unfiltered vacuuming of asbestos dusts

U.S. AIR FORCE

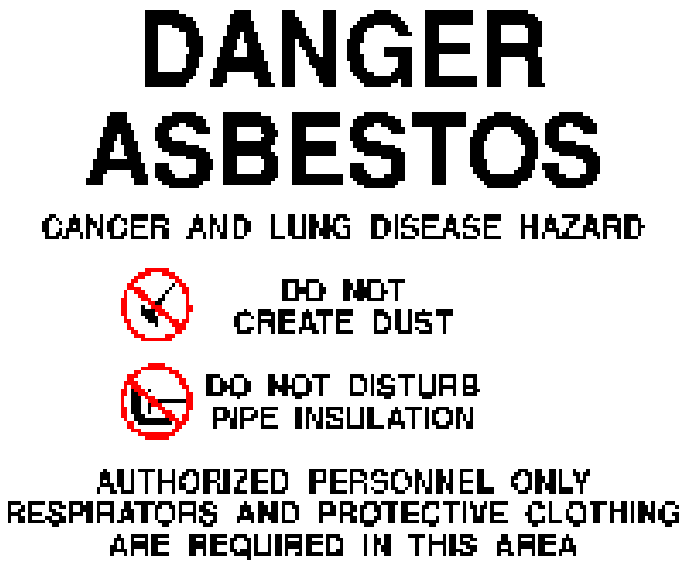
Multifaceted Regulatory Approach

- **TSCA: contractor accreditation; rules for schools**
- **CAA: demolition and renovation activities; NESHAP**
- **OSHA: worker exposure**
  - **General Industry Standard (29 CFR 1910.1001): identifying and managing ACM and presumed ACM (PACM); work practices for maintenance and custodial activities**
  - **Construction (29 CFR 1926.1101): construction, demolition, repair and renovation that disturb ACM**

U.S. AIR FORCE

Regulatory Requirements -- Identification and Response

- **Identification: Where is it? What type is it?**
- **Is it friable/is there a risk to human health?**
  - **Yes ---> abatement of hazard is required**
  - **No ---> abatement not required unless otherwise required by regulation/statute**
- **Mere <u>presence</u> does not pose a health risk**
- **Training (those who may or will encounter ACM in normal course of duties)**


DANGER
ASBESTOS
CANCER AND LUNG DISEASE HAZARD
DO NOT CREATE DUST
DO NOT DISTURB PIPE INSULATION
AUTHORIZED PERSONNEL ONLY
RESPIRATORS AND PROTECTIVE CLOTHING ARE REQUIRED IN THIS AREA

Toxic Substances Control Act (TSCA)

- **Focus directed toward regulation of toxic chemicals**
- **15 U.S.C. § § 2601-2692**
- **Specific substances regulated:** PCBs, **asbestos,** radon and lead
- **Asbestos**
  - **(Title II - Asbestos Hazard Emergency Response)**

Regulatory Requirements -- Identification and Response

- The most important OSHA regulation is probably the Construction Standard for Asbestos
  - Applies to individuals involved in construction, renovation, and demolition activities
  - Establishes a Permissible Exposure Limit (PEL) of 0.1 fibers per cubic centimeter of air (f/cc) as an eight-hour time-weighted average (TWA) and an Excursion Level of 1.0 f/cc as averaged over a sampling period of 30 minutes
  - Dictates engineering controls and personal protective equipment requirements for individuals involved with asbestos-related work and establishes requirements for medical surveillance and recordkeeping

U.S. AIR FORCE

Regulatory Requirements -- Identification and Response

- **OSHA 29 CFR 1910.1001 General Industry Standard for Asbestos. Same PEL and Excursion Limit as outlined in the Construction Standard. Applies to all occupational exposures to asbestos not specified in the Construction Standard**
- **§ 1910.1001(c) PELS § 1910.1001(j)(3) Signage § 1910.1001(j)(2) Labeling § 1910.1001(j)(4) Employee info § 1910.1001(j)(7) Employee training § 1910.1001(j)(2) Recordkeeping**

U.S. AIR FORCE

Regulatory Requirements -- Identification and Response

- Executive Order 12196 issued in Feb 80, all federal agencies are mandated to have occupational safety programs
  - Air Force has implemented this with AFI 91-301, Air Force Occupational and Environmental Safety, Fire Protection, and Health (AFOSH) Program and AFOSH Standard 48-8, Controlling Exposures To Hazardous Materials, Attachment 9 Occupational Exposure to Asbestos
  - The key Air Force asbestos regulation is AFI 32-1052 Air Force Facility Asbestos Management which requires bases to conduct facility asbestos surveys and develop an Asbestos Management Plan and an Asbestos Operating Plan

U.S. AIR FORCE

Regulatory Requirements -- Identification and Response

- Under CAA, EPA promulgated specific standards for asbestos, Asbestos Training Requirements -- Model Accreditation Plan; and Bulk Sampling Requirements for Surfacing Material. In 2000 EPA promulgated a revised rule on worker protection, amending the worker protection rule, WPR, to cover state and local governmental employees
- Virtually all of the states have been delegated authority to administer the federal asbestos NESHAP program, though EPA still retains program oversight authority

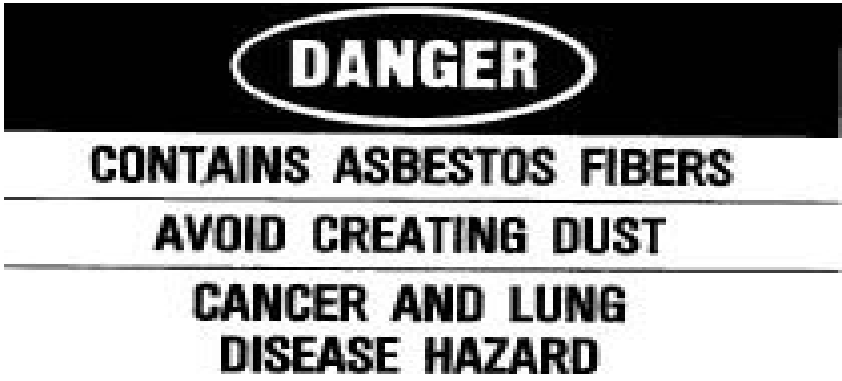
U.S. AIR FORCE

Regulatory Requirements -- Identification and Response

- **The Asbestos NESHAP regulations (40 CFR § 763) provide protection by minimizing the release of asbestos fibers during activities involving the processing, handling, and disposal of asbestos-containing material. They specify work practices to be followed during demolitions and renovations of all structures, installations, and buildings**
  - **The regulations require the owner of the building and/or the contractor to notify applicable State and local agencies and/or EPA Regional Offices (10 wk days) before all demolitions, or before renovations of buildings that contain a certain threshold amount of asbestos**

Work Requirements/Precautions (General Industry)

- Do not cut, drill, crack, peel, vacuum, sand, scrape, clean, wet down
- Notice/signs for employees, public to avoid encountering or disturbing ACM



Response to Asbestos -- Work Project

- Primary areas of concern: renovations, demolitions, property transfers
- Must be undertaken by trained & certified workers (Service or contractors)
- Notification of EPA/state 10 working days before work
- Use respirators, and HEPA filters to abate (or alt)
- Appropriate handling of waste material—40 CFR 61 Subpart M (part of the asbestos NESHAP)

National Response Center

1-800-424-8802

NRC Background | Reporting a Spill | Legislative Requirements | Report and call Statistics | Contacting The NRC | National Response Mechanism

Select a topic and click on the button to navigate through our site.

As

U.S. AIR FORCE

Asbestos Contaminated Property

- DoD policy: Transfer ‘as is’ unless regulations require removal abatement
- Removal / Abatement not required if
  - Buildings scheduled for demolition by transferee
  - Occupation prohibited prior to demolition
  - Transferee accepts the responsibility

Compliance

- **Asbestos: most enforcement done under CAA or OSHA**
  - **Common violations:**
    - **Employee protection violations**
    - **Advance Notice**
    - **Improper Disposal**

Asbestos violations halt work on Navy housing

By ROBERT A. HAMILTON
Day Staff Writer

Groton — Work on two housing projects supervised by the Naval Submarine Base was halted this week when the Navy discovered that a subcontractor on the job was mishandling asbestos.

Trataros Construction of Brooklyn, N.Y., was ordered to stop work on projects to modernize bachelor enlisted quarters on the base and some of the units in the Conning Towers housing park, an off-base project, until the asbestos is cleaned up and a new subcontractor is hired.

Trataros has won more than $33 million in housing projects on the base in the last few years. Its contractor on the project, ECB Construction from New Haven, was unavailable for comment Tuesday.

Robert Jones, the environmental coordinator for the Navy's Northeast region, said the same subcontractor worked on two other bachelor quarters on the base, but intensive surveys done after construction was completed did not reveal any problems in those buildings.

"The oversight that we provide for the contracts would not allow problems like this to exist once we take over a building."

See ASBESTOS *page* D8

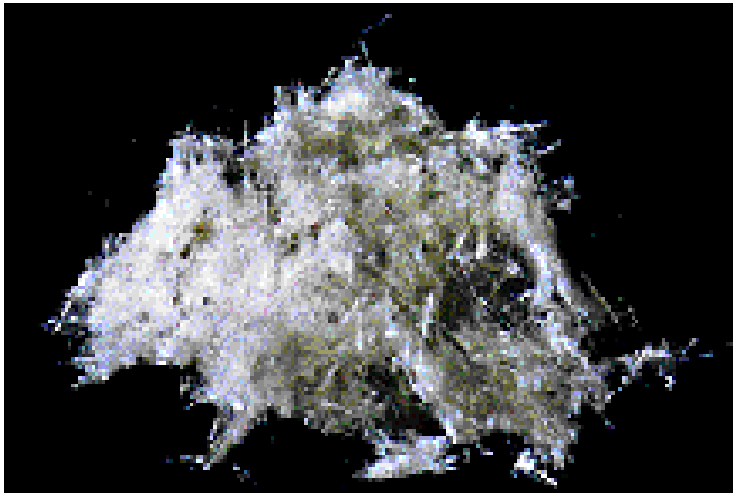
Sovereign Immunity (SI); Asbestos

- **For OSHA SI NOT waived for enforcement (can't even issue a citation to fed agencies, only a report), **but contractors**
  - **Federal Agencies comply with substance of OSHA per EO 12196**
- **For CAA, US EPA can fine, and States might be able to depending on Circuit– ask JA**

Environmental Administrative Fines & Penalties Authority

Media	Federal EPA	State EDs
CAA	Yes, since 1997 DoJ Op	No 11th Cir. Yes 6 & 9th Cir; & maybe others*
USTs	Yes, since 1999 DoJ Op	No
RCRA (Haz & Sol Waste)	Yes, since FFCA of 92	Yes, " "
CWA	No	No
SDWA-drinking	Yes, since 1996	Yes, " "
CERCLA	Yes but, stip only	No
EPCRA	No	No

Windshield Tour



Chrysotile Asbestos under the Microscope

U.S. AIR FORCE

Windshield Tour

U.S. AIR FORCE

Windshield Tour

U.S. AIR FORCE

Windshield Tour

U.S. AIR FORCE

Windshield Tour

Windshield Tour

U.S. AIR FORCE

Windshield Tour

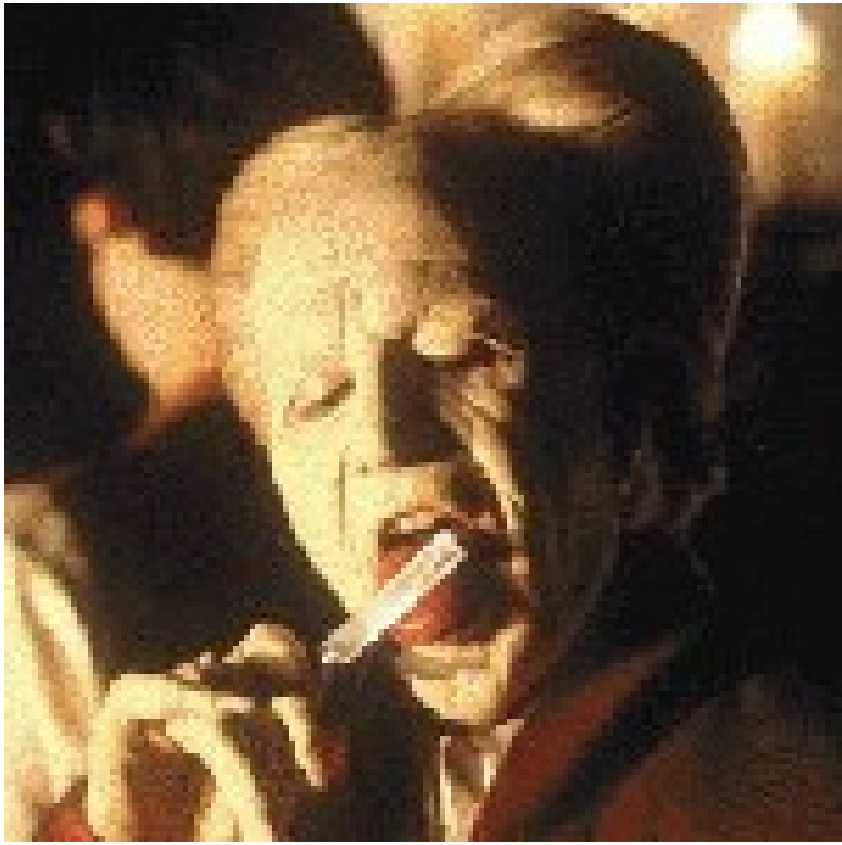
U.S. AIR FORCE

Environmental Enforcer in Action

U.S. AIR FORCE

Penalties for CAA or TSCA Violations

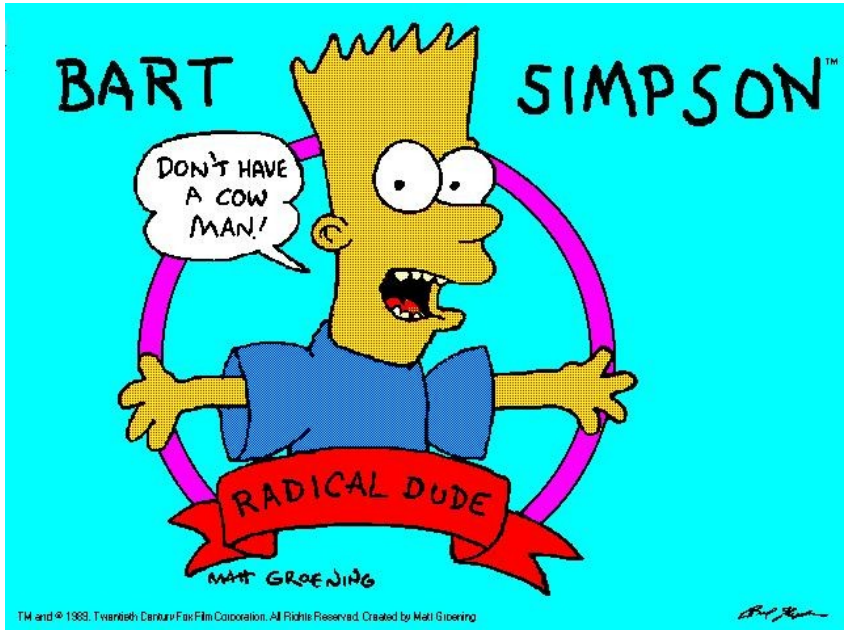
- Civil
  - Up to $27,500 per day per violation
- Criminal
  - For knowing or willful violations
  - Up to $27,500 per day per violation and/or
  - Up to 1 year in jail (more if endangerment)



U.S. AIR FORCE

Asbestos Criminal Violations

- **Like most environmental crimes, the prosecution does not have to prove Defendant had knowledge of the statute or regulation, merely that the substance was a prohibited substance**
  - **E.g. *U.S. v. Dipentino*, 242 F.3d 1090, 1096 (9th Cir. 2001) where evidence of a CAA violation was sufficient where it showed that defendant left debris pile intact when he knew it was created by material that contained asbestos**


BART SIMPSON™
DON'T HAVE A COW MAN!
RADICAL DUDE
MATT GROENING
TM and © 1993, Twentieth Century Fox Film Corporation. All Rights Reserved. Created by Matt Groening

U.S. AIR FORCE

Proactive Ways to Deal with Asbestos Issues

- **When review Categorical Exclusions (CATEXes), Environmental Assessments (EAs), or Environmental Impact Statements (EISes) under the National Environmental Policy Act (NEPA), ensure that asbestos issues are addressed. Specifically, any proposed projects involving maintenance, renovation, demolition, or additions to pre-1980 era structures need to contain an analysis of asbestos testing and abatement of hazards**
- **The base asbestos management plan (including an inventory of buildings surveyed with known ACM) should be closely scrutinized during Environmental Compliance Assessment and Management Program assessments to ensure it is accurate. AFI 32-1052 Air Force Facility Asbestos Management requires Air Force Bases to conduct facility asbestos surveys and develop an Asbestos Management Plan and an Asbestos Operating Plan**

Specific Asbestos Issues

U.S. AIR FORCE

- **For new/relatively new buildings, how can you avoid EPA CAA driven asbestos pre-construction (modification) notice?**

- 40 CFR PART 61--NATIONAL EMISSION STANDARDS FOR HAZARDOUS AIR POLLUTANTS **Subpart M**--National Emission Standard for Asbestos …141 **Definitions.**
  - **Renovation** means altering a facility or one or more facility components in any way, including the stripping or removal of RACM from a facility component. Operations in which load-supporting structural members are wrecked or taken out are **demolitions**.

Specific Asbestos Issues

U.S. AIR FORCE

- 40 CFR PART 61--NATIONAL EMISSION STANDARDS FOR HAZARDOUS AIR POLLUTANTS **Subpart M**--National Emission Standard for Asbestos
- Sec. 61.145 **Standard for demolition and renovation**. (a) **Applicabilit**y. To determine which requirements of paragraphs (a), (b), and (c) of this section apply to the owner or operator of a demolition **or renovation** activity and prior to the commencement of the demolition or renovation, thoroughly inspect the affected facility or part of the facility where the demolition or renovation operation will occur for the presence of asbestos, including Category I and Category II nonfriable ACM. The requirements of paragraphs (b) and (c) of this section apply to each owner or operator of a demolition **or renovation activity**, including the removal of RACM as follows: (1) In a facility being demolished, all the requirements of paragraphs (b) and (c) of this section apply, except as provided in paragraph (a)(3) of this section, if the combined amount of RACM is (i) At least 80 linear meters (260 linear feet) on pipes or at least 15 square meters (160 square feet) on other facility components, or (ii) At least 1 cubic meter (35 cubic feet) off facility components where the length or area could not be measured previously. (2) In a facility being demolished, **only the notification requirements** of paragraphs (b)(1), (2), (3)(i) and (iv), and (4)(i) through (vii) and (4)(ix) and (xvi) of this section apply, if the combined amount of RACM is (i) Less than 80 linear meters (260 linear feet) on pipes and less than 15 square meters (160 square feet) on other facility components, and (ii) Less than one cubic meter (35 cubic feet) off facility components where the length or area could not be measured previously or there is no asbestos.

Specific Asbestos Issues (Pre-Construction Notice)

- **For new/relatively new buildings, how can you avoid EPA CAA driven asbestos pre-construction (modification) notice?**
  - **Florida Admin Code 62-257.200 Definitions.**
    - (9) "Facility" is as defined in **40 CFR 61.141**, adopted and incorporated by reference in Rule 62-204.800, F.A.C.
    - (16) "Renovation" means the alteration in any way of a facility or of one or more facility components. Operations in which load-supporting structural members are wrecked or taken out are demolitions.
    - (20) "Threshold amount of regulated asbestos-containing material" means at least 260 linear feet on pipes, or at least 160 square feet on other facility components ...
    - 62-257.100 Purpose and Scope. (4) **This chapter requires prior notification to the Department in accordance with 40 CFR Part 61, Subpart M.**
  - **Florida Admin Code 62-257.301 Notification Procedure and Fee.** (1) **The notice requirements** of Chapter 62-257, F.A.C., Asbestos Program**, apply to each owner or operator of a renovation of a facility involving the removal of a threshold amount of regulated ACM** or any demolition of a facility regardless of whether or not asbestos is present and to each owner or operator of the site for a renovation of a facility involving the removal of a threshold amount of regulated ACM or any demolition of a facility regardless of whether or not asbestos is present.

Specific Asbestos Issues

U.S. AIR FORCE

- **For new/relatively new buildings, how can you avoid EPA CAA driven asbestos pre-construction (modification) notice?**
  - Conclusion: if the site manager is confident that no ACM is present, he could avoid doing prior notice for a renovation project. Keep in mind that if ACM is later found, the site would be subject to a NOV for lack of prior notice (and probably for failing to follow asbestos handling procedures). So, basically, Florida's position is an ultraconservative stance that lessens the potential of a NOV. However, if a site manager is confident that no ACM is present, he could take the risk and conduct the renovation project. If no ACM is ever found, a NOV would not be sustainable!
  - Ensure contracts contain provision that prohibit use of ACM-containing products!
    - E.g. MM. Asbestos Certification. No items, components of materials which are specified to be worked on under this contract, contain asbestos.
  - Lastly, keep in mind that Air Force instructions require inventories of buildings for ACM. See AFI 32-1052 *Air Force Facility Asbestos Management*, 22 Mar 1994, http://www.e-publishing.af.mil/pubfiles/af/32/afi32-1052/afi32-1052.pdf. Also, the AFOSH standard requires the BE review construction/renovation plans for ACM and requires worksite supervisors to be aware of ACM in the workplace. http://www.e-publishing.af.mil/pubfiles/af/48/afoshstd48-8/afoshstd48-8.pdf

Self Reporting Environmental Violations

- In 1995, EPA issued “Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations” (60 FR 66,706)
  - It stipulates that the “gravity” component of fines—as opposed to the “economic benefit” component —will be reduced by 100% for a firm that discovers a violation through a systematic auditing program (75% if not from audit), voluntarily discloses the violation **21 days** after discovery without prompting from government or a third party plaintiff, corrects the violation within 60 days, takes steps to prevent recurrence, and cooperates with EPA throughout
- ECAMPs– rarely report minor findings, unless there is actual release/health risk, or permit requiring reporting
  - E.g. Permit Provisions --Title V – reporting provisions and certification of annual compliance usually forces self-reporting of violations

Any Questions???

U.S. AIR FORCE

The end